

*Bad Faith Filing of Ch. 13 - multiple filings, failure to pay into plan.*

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Brunswick Division

In the matter of:

MABLE HILL

Debtor

GILMAN UNITED FEDERAL  
CREDIT UNION

Movant

v.

MABLE HILL

Respondent

Chapter 13 Case

Number 89-20465

**FILED**

at 12 O'clock & 56 min. PM

Date 5/8/90

MARY C. BECTON, CLERK  
United States Bankruptcy Court  
Savannah, Georgia *PJB*

MEMORANDUM AND ORDER

On February 15, 1990, a hearing was held upon Gilman United Federal Credit Union's Motion for Relief from Stay and for Dismissal with Prejudice. Upon consideration of the evidence adduced at trial, argument of counsel, consideration of the record of Debtor's present and two past Chapter 13 cases, and applicable

authorities, I make the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

On January 5, 1987, Debtor filed a petition under Chapter 13 of the Bankruptcy Code with this Court. Said case was voluntarily dismissed on June 4, 1987, as Debtor was unable or unwilling to make the required payments into the plan.

Thereafter, on July 22, 1988, Debtor filed a second Chapter 13 case with this Court. Debtor's second case was involuntarily dismissed on February 13, 1989, for Debtor's failure to appear at the Continued Confirmation Hearing and also for Debtor's failure to make the required payments into the plan.

On September 1, 1989, Debtor filed a third proceeding under Chapter 13 of the Code with this Court, the case at bar.

Movant Gilman United Federal Credit Union ("Gilman") has two secured loans with this Debtor. The first, with a principal balance of \$16,417.05, is secured by the Debtor's primary residence. The second loan, with a principal balance of \$7,900.56, is secured

by a 1984 Buick Regal automobile. Said automobile is currently inoperable and has apparently been so for more than two years. Neither Debtor's home nor the automobile have the required insurance coverage listing Gilman as loss payee.

On September 5, 1989, after proper notice and advertisement, Debtor's principal home was sold by Gilman on the Camden County Superior Courthouse steps pursuant to applicable Georgia law and the security agreement between Debtor and Gilman. Gilman was the highest bidder at \$21,240.92. Gilman was unaware that Debtor had filed her present petition on September 1, 1989, and when informed by Debtor's attorney, Gilman took no further action respecting the property until it filed the present Motion for Relief from Stay with this Court.

During the pendency of Debtor's first Chapter 13 case, from January 5, 1987 to June 4, 1987, Gilman received a total of \$43.45 from the Debtor either directly or through the Chapter 13 plan. As of June 4, 1987, Debtor was \$1,556.55 in arrears on her contractual obligations to Gilman.

Following dismissal of the Debtor's first Chapter 13 plan, from June 4, 1987, through July 22, 1988, Debtor paid Gilman \$2,865.00 towards her obligation of \$3,061.00. In the fall of 1987,

Gilman granted Debtor an extension on her loans, effectively forgiving the arrearages and making her current again.

From July 22, 1988, through February 13, 1989, the pendency of the Debtor's second Chapter 13 case, Gilman received a total of \$50.00 from the Debtor, either directly or through the Chapter 13 plan. From February 13, 1989, the date of the involuntary dismissal of the Debtor's second Chapter 13 plan through September 1, 1989, debtor paid nothing to Gilman on her obligations. Gilman repeatedly contacted the Debtor between February and September, 1989, requesting that she come in and make arrangements on the loans but Debtor never responded to Gilman's requests.

Debtor's present Chapter 13 petition and schedules contain several material omissions. Specifically, Debtor did not list her part-time job nor declare any income from that job. In addition, Debtor listed only one of her prior Chapter 13 bankruptcies and failed to declare ownership of a 1978 Ford Mustang automobile. Debtor has filed no amendments to her petition to correct these omissions.

Debtor's current Chapter 13 petition and schedules list only three debts, the two secured debts with Gilman and one unsecured debt with U.S. Sprint in the amount of \$876.10. Since

U.S. Sprint failed to file a proof of claim, Gilman is the only creditor remaining. Debtor contracted for bi-weekly payments of \$200.00 or \$433.00 per month on the loan secured by the Debtor's principal residence. However, Debtor's plan only proposes semi-monthly payments of \$172.00, or a total of \$342.00 per month. Although Debtor was current at the time of this hearing, her proposed plan fell short of the contractual rate of payments on her principal residence. In addition, Debtor valued the 1984 Buick Regal at \$3,500.00, which would bifurcate Gilman's claim on that loan, resulting in a secured claim of \$3,500.00, and an unsecured claim \$4,400.56. Both parties agreed that the automobile was worth significantly less than the \$3,500.00 valuation.

In response to Gilman's objection under 11 U.S.C. Section 1322(b)(2), Debtor proposed to increase payments under the plan to cover the home mortgage and to surrender the car in full satisfaction of the debt. Gilman objected to the surrender of the automobile in full satisfaction of the debt.

#### CONCLUSIONS OF LAW

Gilman alleges that the Debtor's current Chapter 13 case was not filed in good faith, was abusive and was intended only to

hinder, delay and frustrate the efforts of Gilman in the exercise of its contractual rights. 11 U.S.C. Section 1325(a)(3) provides that a Chapter 13 plan must have been proposed in good faith. Eight of our twelve circuit courts have considered the good faith issue with all eight adopting a "totality of the circumstances" test.<sup>1</sup> In Matter of Hale, 65 B.R. 893 (Bankr. S.D.Ga. 1986), this Court specifically adopted the eleven factors laid out in Kitchens v. Georgia Railroad Bank & Trust Co. (In re Kitchens), 702 F.2d 885 (11th Cir. 1983), on the question of good faith. Those factors include:

- 1) The amount of the debtor's income from all sources;
- 2) The living expenses of the debtor and his dependents;
- 3) The amount of attorney's fees;
- 4) The probable or expected duration of the debtor's Chapter 13 plan;
- 5) The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
- 6) The debtor's degree of effort;

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<sup>1</sup> In re Deans, 692 F.2d 968 (4th Cir. 1982); In re Rimgale, 669 F.2d 426 (7th Cir. 1982); In re Estus, 695 F.2d 311 (8th Cir. 1982); In re Goeb, 675 F.2d 1386 (9th Cir. 1982); In re Flygare, 709 F.2d 1344 (10th Cir. 1983); In re Kitchens, 702 F.2d 885 (11th Cir. 1983); In re Barnes, 689 F.2d 193 (D.C. Cir. 1982); In re Freeman, 712 F.2d 519 (5th Cir. 1983).

- 7) The debtor's ability to earn and the likelihood of fluctuation in his earnings;
- 8) Special circumstances such as inordinate medical expenses;
- 9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessor;
- 10) The circumstances under which the debtor has contracted his debts and has demonstrated bona fides or lack of same, in dealing with his creditors;
- 11) The burden which the plan's administration would place on the trustee.

This Court also specifically adopted both substantiality of repayment and potential non-dischargeability of the debt in Chapter 7. Hale at 895. In Hale, this Court observed that the court is charged with the duty of making a case by case inquiry to determine whether the proposed Chapter 13 plan meets the statutory criteria including "good faith", and noted that the adoption of 11 U.S.C. Section 1325 does nothing to alter the thrust of the Kitchens line of cases. After reviewing the conduct of the Debtor in this case I find that the circumstances under which the Debtor has contracted her debts and her lack of honesty in dealing with Gilman is such as to warrant dismissal of the Debtor's case with prejudice.

Generally speaking, "good faith" for purposes of the Bankruptcy Code provisions requiring "good faith" as a prerequisite to confirmation of the Debtor's Chapter 13 plan, requires more than technical compliance with the provisions of the statute; "good faith" requires "honesty of purpose" on the part of the debtor and contemplates broad judicial inquiry into the debtor's conduct and state of mind in proposing a plan. The courts should determine whether, under the facts and circumstances of the case, there is an abuse of the provisions, purpose, or spirit of Chapter 13. In re Hawes, 73 B.R. 584 (E.D.Wis. 1987).

If the court discovers unmistakable manifestations of bad faith, as we do here, confirmation must be denied . . . The bankruptcy court [must] preserve the integrity of the bankruptcy process by refusing to condone its abuse. The cornerstone of the bankruptcy courts has always been that doing of equity. The protections and forgiveness inherent in the bankruptcy laws surely will require conduct consistent with the concept of basic honesty. Good faith or basic honesty is the antithesis of attempting to circumvent a legal obligation through a technicality of the law.

In re Waldron, 785 F.2d 936, 941 (11th Cir. 1986).



The Tenth Circuit in In re Flygare, 709 S.E.2d 1344 (1983), quoted approvingly from the Eighth Circuit opinion in In re Estus, 695 F.2d 311 (1982):

The proper inquiry should follow the analysis adopted by the Fourth Circuit (In re Deans, 692 F.2d 968): Whether the plan constitutes an abuse of the provisions, purpose or spirit of Chapter 13. The bankruptcy court must utilize its fact-finding expertise and judge each case on its own facts after considering all the circumstances of the case. If, after weighing all the facts and circumstances, the plan is determined to constitute an abuse of the provisions, purpose or spirit of Chapter 13, confirmation must be denied.

The Seventh Circuit in In re Rimgale, 669 F.2d 426, 432 (1982), enumerated an earlier test to determine the debtor's good faith in filing and proposing a Chapter 13 plan:

- 1) Does the proposed plan state [the debtor's] secured and unsecured debts accurately?
- 2) Does it state [the debtor's] expenses accurately?
- 3) Is the percentage of repayment of unsecured claims correct?
- 4) If there are or have been deficiencies in the plan, do the inaccuracies amount to an attempt to mislead the bankruptcy court?

- 5) Do the proposed payments indicate 'a fundamental fairness in dealing with ones creditors'?

Generally speaking, "good faith", for purposes of Bankruptcy Code provisions requiring "good faith" as a prerequisite to confirmation of a Chapter 13 debtor's plan, requires more than technical compliance with provisions of the statute; "good faith" requires "honesty of purpose" on the part of the debtor and contemplates broad judicial inquiry into debtor's conduct and state of mind in proposing a plan, and the courts should determine whether under the facts and circumstances of the case, there is abuse of the provisions, purpose, or spirit of Chapter 13. In re Hawes, 73 B.R. 584, (E.D.Wis. 1987). (Emphasis added).

The application of the above-stated criteria to the facts of the present case militates strongly against the determination of "good faith" which would allow confirmation of the debtor's plan. First, Debtor did not fully disclose material facts including certain assets, income, and the existence of a prior Chapter 13 case. None of the omissions will be considered inadvertent in that full disclosure of relevant facts is a necessary element of the good faith necessary for confirmation of a Chapter 13 plan. Debtor's failure to list a second employer and income derived therefrom cannot be considered inadvertent in light of the

fact that she now bases and supports a proposed increase in payments on them. Debtor's failure to disclose ownership in a second car cannot be considered inadvertent in light of the fact that her budget includes \$47.00 per month for automobile insurance and in light of her testimony that she has not had insurance on the Buick listed on her petition for over two years. Debtor's failure to disclose one of her prior unsuccessful Chapter 13 plans cannot be considered inadvertent in light of its significance to her and its ultimate significance to this injury. Full disclosure of relevant facts is a necessary element of the good faith necessary for confirmation of a Chapter 13 plan. In re Overstreet, 23 B.R. 712 (Bankr. W.D.La. 1982).

Secondly, Debtor's proposed plan extensively modifies Gilman's claim secured by Debtor's principal residence in violation of 11 U.S.C. Section 1322(b)(2). In order to avoid application of that code section, Debtor proposes to surrender a 1984 car (that does not run because of major engine failure) in satisfaction of a \$7,900.56 debt. Even under the original plan, the majority of Gilman's claim for this debt would be considered unsecured. Gilman, with its two secured claims, is the only creditor in Debtor's case. I find that the Debtor's proposed surrender of an inoperable 1984 vehicle in full satisfaction of a \$7,900.00 debt does not indicate

a fundamental fairness in dealing with creditors. Rimgale, 669 F.2d at 432.

Fourth, as Debtor acknowledged, she filed her current Chapter 13 plan with knowledge of the impending foreclosure on her home. Her only other creditor, U.S. Sprint, was not pressuring her for repayment and had not taken any legal action to collect payment. Debtor filed her current Chapter 13 plan on the eve of foreclosure in order to prevent it. A petition filed to prevent foreclosure is not filed in bad faith so long as there is a legitimate purpose of reorganization. In re Chisum, 847 F.2d 597 (9th Cir. 1988). However, Debtor's proposed plan does not evidence a legitimate purpose to reorganize. Debtor had paid Gilman only \$50.00 from July 22, 1988 (the date of filing of her second Chapter 13 plan) to September 1, 1989, when she filed her current case. Debtor was making no effort to pay Gilman under her contracts. Reorganization was not, therefore, necessary to salvage best efforts which were not adequate due to factors beyond the Debtor's control. The severe modifications of the secured claims of Gilman, the only creditor in the plan, and Debtor's continued refusal to obtain required insurance coverage in order to adequately protect Gilman's interest in its collateral, make it apparent that the plan was not proposed for any legitimate purpose of reorganization. Absent evidence of the legitimate purpose of reorganization, it is clear that the

filing on the eve of foreclosure is indicative of the Debtor's bad faith. Such factors justify dismissal of the Debtor's petition. In re Corey, 19 B.R. 76 (Bankr. S.D.Ala. 1982).

This is the Debtor's third Chapter 13 plan within less than three years. Neither of the first two were ever confirmed. Rather, both were dismissed, the second one involuntarily because of the Debtor's failure to participate and make the required payments into the plan. Debtor failed to make the required payments to the first plan as well. A debtor's history of filings and dismissals is relevant in determining whether a plan has been proposed in good faith. Hale, supra. Successive filings do not necessarily indicate an abuse of this system, provided that the successive filings can be justified by reason of change in circumstances occurring between the filings. Chisum, supra; In re Metz, 67 B.R. 462 (9th Cir. B.A.P. 1986). The debtor must come forward with any bona fide change in circumstances to justify successive filings. Matter of Hagberg, 92 B.R. 1005 (W.D.Wis. 1988); In re White, 782 B.R. 169 (D.S.C. 1986). Debtor presented no evidence that the timing and frequency of her previous filings were prompted or justified by any change in her financial circumstances. On the other hand, Gilman's evidence regarding Debtor's conduct between the cases negates any argument that the filings were necessary to salvage the Debtor's best efforts which

were not adequate due to factors beyond her control. In the absence of evidence of change of circumstances, and in light of the Debtor's near complete lack of effort both within and between her Chapter 13 cases, I am compelled to determine the Debtor's three successive filings constitute an abuse of the bankruptcy system. Hale, supra.

If the Debtor disagreed with this Court's decision as to the dismissal of her second case, she could have taken an appeal. Rather, Debtor allowed the case to be dismissed then merely refiled. Debtor's multiple filing constitutes a circumvention of the normal appeal process available to losing litigants. It is therefore an abuse of bankruptcy procedure and constitutes a lack of good faith. Creditors may be put to the burdens and costs of defending an appeal, but should not be re-exposed to the burdens and costs which inevitably arise in a completely new bankruptcy case. In re Beswick, 98 B.R. 900, 904 (Bankr. N.D. Ill. 1989). This Court will not countenance multiple filings where there is an unexcused inability or unwillingness to pay into the plan which leads to the debtor's dismissal.

Finally, Debtor's final proposed plan would basically consist of only the mortgage payment to be paid through the Court. Such a plan would place an unreasonable and unnecessary burden upon the Chapter 13 Trustee.

Based upon all of the factors outlined above, I conclude that this Chapter 13 plan is not proposed in good faith and was filed in order to hinder, delay and frustrate the efforts of Gilman in the exercise of its contractual rights. I further find that the filing of the instant case was abusive.

The abusive filing provision of 11 U.S.C. Section 109(g) does not specifically apply to this case. However, 11 U.S.C. Sections 105(a) and 349(a) provide the court with the authority, to be exercised in appropriate circumstances, to dismiss an abusively filed case with prejudice and to enjoin a subsequent filing thereof. See In re McClure, 69 B.R. 282, (N.D.Ind. 1987); In re Dyke, 58 B.R. 714 (N.D. Ill. 1986); Cashman Investment Corp. v. Robinson (In re Bradley), 38 B.R. 425 (C.D.Cal. 1984); In re Damien, 35 B.R. 684 (S.D. Fla. 1983); In re Martin-Trigona, 35 B.R. 596 (S.D.N.Y. 1983). Both the spirit and purpose of Section 109(g) to prevent abusive filings will be furthered by applying Sections 105(a) and 349(a) to this case. Based on the preceding discussion of the abusive actions by Debtor, this Court will dismiss this case with prejudice and Debtor will be ineligible to file another bankruptcy petition under Title 11 for a period of 180 days from entry of this Order.

11 U.S.C. Section 362(d) grants the Bankruptcy Courts the power to annul the automatic stay. The word "annul" contemplates the courts have the power to grant relief from the stay which has a retroactive effect. In re Albany Partners, Ltd., 749 F.2d 670 (11th Cir. 1984). Permitting the automatic stay to be annulled allows a Bankruptcy Court to validate a mortgagee's post-petition actions in those instances where it would be inequitable to vacate the transfer. Albany Partners, Id.; In re Purnell, 92 B.R. 625 (E.D.Pa. 1988).

#### O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Gilman United Federal Credit Union's Motion for Relief from Stay is granted, the automatic stay is annulled and Gilman's foreclosure is hereby deemed valid to the extent it is otherwise valid according to state law, and Gilman is hereby authorized to proceed with the filing and recording of its deed under power of sale.

IT IS FURTHER ORDERED that the Debtor's current Chapter 13 plan is hereby dismissed with prejudice as an abusive filing.



Debtor will be ineligible to file another petition under Title 11 for a period of 180 days from the entry of this Order.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 30<sup>th</sup> day of April, 1990.